

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(18)C
Corporation Tax
November 20, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C000706A

On July 6, 2000, a Petition for Advisory Opinion was received from Sprint Spectrum LP, 6500 Sprint Parkway, MS: KSOPHL0512 - 5ATTX, Overland Park, Kansas 66251.

The issues raised by Petitioner, Sprint Spectrum LP, are:

(1) Whether personal communications services provided in New York under licenses granted by the Federal Communications Commission ("FCC") are a "local telephone business" within the meaning of section 184 of Article 9 of the Tax Law imposing the additional franchise tax on transportation and transmission corporations and associations.

(2) Assuming the personal communications services referred to in Issue (1) are a "local telephone business" for purposes of section 184 of the Tax Law, whether section 184 applies to such business when conducted through a partnership which has one or more corporate partners.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner provides broadband personal communications services ("PCS") under licenses granted to it by the FCC. These licenses permit Petitioner to provide to its subscribers wireless communications in New York and other states throughout the nation. Petitioner began providing its New York subscribers with PCS on or about December 27, 1996. Subscribers to Petitioner's wireless service are generally capable of making or receiving telecommunications that either (1) originate and terminate within the same local access and transport area ("LATA") or (2) originate in one LATA and terminate in a different LATA.

Discussion

Issue 1

Section 184.1 of Article 9 of the Tax Law, provides that the term "local telephone business" means the provision or furnishing of telecommunication services for hire wherein the service furnished by the provider thereof consists of carrier access service or the service originates and terminates within the same local access and transport area ("LATA"). It also provides that the term "telecommunication services" has the same meaning for purposes of section 184 as for section 186-e of the Tax Law.

Section 186-e.1(g) of the Tax Law defines "telecommunication services" as "telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service ... and also include any equipment and services provided therewith. Provided, the definition of telecommunication services shall not apply to separately stated charges for any service which alters the substantive content of the message received by the recipient from that sent."

In this case, Petitioner provides PCS under licenses granted by the FCC. Petitioner provides to its subscribers wireless communications in New York and other states. Subscribers can make or receive telecommunications that are either intra-LATA or inter-LATA. The conduct of such business constitutes a "local telephone business" under section 184 of the Tax Law.

Issue 2

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office in New York State. Section 209.4 of the Tax Law provides that a corporation liable for tax under sections 183 through 185 of Article 9 of the Tax Law is not subject to tax under Article 9-A of the Tax Law.

Section 183 of Article 9 of the Tax Law imposes a franchise tax on a domestic or foreign corporation formed for or principally engaged in the conduct of a telephone business, for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office, in New York State. The conduct of a "local telephone business" pursuant to section 184 of the Tax Law, constitutes the conduct of a "telephone business" under section 183 of the Tax Law.

Section 184.1 of the Tax Law provides that a corporation subject to tax under section 183 of the Tax Law is subject to the additional franchise tax under section 184 for the privilege of exercising its corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office, in New York State, if it is formed for or principally engaged in the conduct of local telephone business.

For purposes of Article 9-A and sections 183 and 184 of Article 9 of the Tax Law, the term "corporation" includes a publicly traded partnership treated as a corporation for purposes of section 7704 of the IRC.

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In this case, Petitioner is a partnership and is not subject to tax under Article 9-A or section 183 or 184 of Article 9 of the Tax Law unless it is considered to be a corporation for purposes of section 7704 of the IRC. For purposes of this Advisory Opinion, it is assumed that Petitioner is not treated as a corporation for purposes of such section 7704. Therefore, Petitioner is not subject to tax under Article 9-A or sections 183 and 184 of the Tax Law.

However, a corporate partner of a partnership conducting a local telephone business in New York would be subject to tax under Article 9-A or sections 183 and 184 of the Tax Law.

To determine the classification and proper taxability of a corporate partner of a partnership under either Article 9 or Article 9-A, an examination of the nature of the corporation's activities is necessary, regardless of the purpose for which the corporation was organized. See Matter of McAllister Bros., Inc. v Bates, 272 App Div 511, 517 (3rd Dept. 1947). Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50 percent of its receipts are derived. See, e.g., Joseph Bucciero Contracting Inc., Adv Op St Tax Commn, July 23, 1981, TSB-A-81(5)C.

For purposes of sections 183 and 184 of the Tax Law, where a partnership is engaged in the conduct of a telephone business, a corporate general partner is, generally, also engaged in the conduct of a telephone business. In interpreting section 209.1 of the Tax Law, section 1-3.2(a)(5) of the Article 9-A Regulations sets forth a general rule which holds that if a partnership is exercising any of the privileges of section 209.1, then all of its corporate general partners are subject to the tax imposed by Article 9-A. The same interpretation was made for purposes of Article 9 of the Tax Law in The Partners of Buffalo Telephone Company, Adv Op Comm T & F, February 22, 1989, TSB-A-89(3)C. The Advisory Opinion held that where a partnership is engaged in a telephone business in New York State, each corporate partner is also engaged in a telephone business in New York State, and each corporate general partner of the partnership that was principally engaged in such telephone business was subject to tax under sections 183 and 184 of Article 9 of the Tax Law.

Section 1-3.2(a)(6)(i) of the of the Business Corporation Franchise Tax Regulations (the "Article 9-A Regulations") provides, in part:

[a] foreign corporation is doing business, employing capital, owning or leasing property or maintaining an office in New York State if it is a limited partner of a partnership, other than a portfolio investment partnership, which is doing business, employing capital, owning or leasing property or maintaining an office in New York State and if it is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership. A foreign corporation is engaged in such manner in the business activities or affairs of the partnership if one or more of certain factual situations ... exist during the taxable year

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In GTE Spacenet Corp. v NYS Dept of Taxation and Finance, 224 AD2d 283, the Court held that while the partnership was arguably engaged in activities enumerated in sections 183, 183-a, 184 and 184-a of the Tax Law, the evidence demonstrated that the partners were engaged in the investment business and were not engaged in the conduct of any of the businesses enumerated in sections 183, 183-a, 184 and 184-a of the Tax Law because the partners were mere passive investors and did not participate in the day-to-day management or operations of the partnership. Therefore, the partners were subject to tax under Article 9-A and were not subject to the franchise taxes imposed pursuant to sections 183, 183-a, 184 and 184-a of the Tax Law.

Pursuant to section 1-3.2(a)(6) of the Article 9-A Regulations, a corporate partner would be engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership if it meets the conditions of such section 1-3.2(a)(6). If the corporation does meet the conditions of section 1-3.2(a)(6), it would be doing business, employing capital, owning or leasing property or maintaining an office in New York State and would be subject to tax under Article 9-A unless it is subject to tax under section 183 of Article 9 of the Tax Law.

In this case, if the corporate partner is a mere passive investor and does not participate in the day-to-day management or operations of partnership, then, pursuant to GTE Spacenet, *supra*, the corporate partner would not be considered to be engaged in the business of the partnership and would not be subject to tax under section 183 of Article 9 of the Tax Law. However, if the corporate partner is not a mere passive investor or if it participates in the day-to-day management or operations of the partnership, the corporate partner would not come within the scope of GTE Spacenet, *supra*. Following Partners of Buffalo Telephone, *supra*, the corporate partner would be considered to be engaged in the business of the partnership and if the corporate partner is principally engaged in such business, it would be subject to tax under section 183 of the Tax Law.

If the corporate partner is principally engaged in a telephone business taxable under section 183 of the Tax Law, and it is also principally engaged in local telephone business, the corporate partner would also be subject to the additional franchise tax imposed under section 184 of the Tax Law.

DATED: November 20, 2000

/s/

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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.